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Supreme Court, U.S.
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No. 04-1259

IN THE

Supreme Court of the United States

METRONET SERVICES CORPORATION,
Petitioner,

v.

QWEST CORPORATION,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals properly applied *Verizon Communications Inc.* v. *Law Offices of Curtis V. Trinko LLP*, 540 U.S. 398 (2004), in determining that respondent did not violate section 2 of the Sherman Act when it amended the terms of certain volume discounts to avoid losing both short term and long term revenue.

RULE 29.6 STATEMENT

Petitioner Qwest Corporation, formerly U S WEST Communications, Inc., is a wholly owned subsidiary of Qwest Services Corporation, which is a wholly owned subsidiary of Qwest Communications International Inc. (QCII), which is publicly traded. Legg Mason Funds Management, Inc., Legg Mason Capital Management, Inc. and Legg Mason Focus Capital, Inc., which are wholly owned subsidiaries of Legg Mason, Inc., a publicly traded company, collectively own more than 10% of the stock of QCII. Legg Mason, Inc. has expressly disclaimed beneficial ownership of such stock. No other publicly held company owns 10% or more of QCII's stock.

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OPINION BELOW

The court of appeals' opinion on remand from this Court (Pet. App. 1a-25a) is reported at 383 F.3d 1124.

JURISDICTION

The judgment of the court of appeals was entered on September 24, 2004. A rehearing petition was denied on December 17, 2004. The petition for certiorari was filed on March 17, 2005. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATEMENT

A. Statutory Background

Respondent Qwest, the successor to U S WEST by merger, is the primary incumbent local exchange carrier (ILEC) in fourteen western states. As such, it is extensively regulated both under state public utilities law and un-

der the Telecommunications Act of 1996 (1996 Act), which obligates each ILEC to cooperate in helping competitors enter its local telephone markets. *See generally Verizon Communications Inc.* v. *Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004).

To serve customers of their own, these new entrants, known as competitive local exchange carriers ("CLECs"), may avail themselves of an ILEC's network facilities and service offerings in three different respects. First, they may build their own facilities and demand interconnection with the ILEC's network. 47 U.S.C. § 251(c)(2), (6). Second, they may lease pieces ("elements") of the ILEC's network at low, regulated rates. 47 U.S.C. §§ 251(c)(3), (d)(2), 252(d)(1); *see generally AT&T Corp.* v. *Iowa Utils. Bd.*, 525 U.S. 366, 371 (1999). Finally, they may purchase an ILEC's retail telephone services at wholesale rates (discounted off retail rates pursuant to a specific statutory formula) and resell those services to end users. 47 U.S.C. §§ 251(c)(4), 252(d)(3). This Court and Congress have recognized that the 1996 Act is "extraordinary" in that it "give[s] aspiring competitors every possible incentive to enter local retail telephone markets" and requires ILECs to help "'competitors come in and try to beat [their] economic brains out.'" *Verizon Communications Inc.* v. *FCC*, 535 U.S. 467, 488-89 (2002) (quoting 141 Cong. Rec. S15572 (daily ed. 1995) (statement of Sen. Breaux)).

The statutory rights created by the 1996 Act are enforceable by expert regulatory agencies: the Federal Communications Commission (FCC) and individual state public utilities commissions. The FCC has issued, and regularly updates, exhaustive rules detailing the terms on which ILECs must make their services and facilities available to CLECs—rules that, as this Court has recognized, have been aggressively pro-competitor. *Id.* at 488-92.[1]

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[1] Under a separate provision of the Act, the largest ILECs—the Bell operating companies, including Qwest—are barred from providing long distance services in their respective local service areas until after they

The state commissions play a pervasive role as well in ensuring the openness of local markets to all forms of facilities-based and resale-oriented competition. ILECs must enter into "interconnection agreements" with CLECs that flesh out exactly how the former will help the latter "beat [their] economic brains out," *id.* at 488 (quotation marks omitted), through the exercise of their new leasing, interconnection, and resale rights. *See* 47 U.S.C. § 252. State commissions arbitrate unresolved issues between ILECs and CLECs, *id.* § 252(b)(1), and retain continuing authority thereafter to interpret and enforce the terms of the ensuing interconnection agreements.[2]

B. Factual History

This case involves the sale of a telecommunications service called "Centrex" to small businesses in the Seattle/Tacoma area. Centrex is a product that combines multiple-line access and calling "features" (such as call-forwarding and call waiting) by means of special software in a telephone company switch. The Washington Utilities and Transportation Commission (WUTC) regulates the retail price of the access component of Centrex service but not the features component, having found the latter competitive in 1987. Pet. 4; Pet. App. 44a. Nonetheless, features are included within the "switching" network element that, since 1996, CLECs

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have proven to the FCC that, among other things, they have fully opened their local markets to competition by complying with their underlying regulatory obligations, including the resale provision of section 251(c)(4). *See* 47 U.S.C. § 271. Qwest has made that showing for the state of Washington (and all its other states). *See* Memorandum Opinion and Order, *Application by Qwest Communications International, Inc. for Authorization To Provide In-Region, InterLATA Services in the States of Colorado, Idaho, Iowa, Montana, Nebraska, North Dakota, Utah, Washington and Wyoming*, 17 FCC Rcd 26303 (2002).

[2] *See, e.g., BellSouth Telecomm., Inc.* v. *MCImetro Access Transmission Servs., Inc.*, 317 F.3d 1270, 1274-76 (11th Cir. 2003) (en banc); *Bell Atlantic Md., Inc.* v. *MCI WorldCom, Inc.*, 240 F.3d 279, 304 (4th Cir. 2001), *vacated on other grounds sub nom. Verizon Md., Inc.* v. *Public Serv. Comm'n*, 535 U.S. 635 (2002).

have been entitled to lease from ILECs under the *federal* law governing *wholesale* relationships between carriers. *See Iowa Utils. Bd.*, 525 U.S. at 387 ("vertical switching features, such as caller I.D., are functions provided by means of the switch, and thus fall squarely within the statutory definition" of network element) (internal quotation marks and ellipsis omitted); First Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499, 15707 ¶ 413 (1996) (requiring unbundling of switching element under 47 U.S.C. § 251(c)(3)), *aff'd in part, rev'd in part sub nom. AT&T Corp.* v. *Iowa Utils. Bd.*, 525 U.S. 366 (1999).[3] And the FCC has separately concluded that "vertical switching features should be available to competitors through the resale provision of section 251(c)(4)," *id.*, under which CLECs such as MetroNet are entitled to purchase finished retail services from ILECs such as Qwest at a prescribed wholesale discount.

Large business customers have traditionally chosen between (i) buying Centrex services from the telephone company and (ii) purchasing their own internal switching equipment—known as Private Branch Exchanges (PBXs)—from telecommunications equipment vendors. In the 1980s, to compete more effectively against the PBX option for these large business customers in Seattle and Tacoma, Qwest began offering a substantial volume discount on Centrex services to customers purchasing 21 or more lines. Pet. App. 4a. Qwest did not offer these discounts to smaller business customers, because it rarely makes economic sense for such customers to incur the high fixed cost of a PBX. Extending to smaller customers the same Centrex discount that Qwest

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[3] In February 2005, the FCC released an order that begins phasing out the availability of mass market switching functionality as an unbundled network element available under section 251(c)(3). *See* Order on Remand, *Unbundled Access to Network Elements*, WC Dkt. No. 04-313, 2005 WL 289015 (Feb. 4, 2005). CLECs will nonetheless retain all applicable resale rights under section 251(c)(4).

provided to larger customers would have only reduced Qwest's revenues from ordinary business lines (known as "1FB" lines). *Id.* at 16a & n.14.

Respondent MetroNet is a reseller of telecommunications services in the Seattle/Tacoma area. As early as 1985, MetroNet and other resellers recognized that the difference between the volume-discounted Centrex rates and the 1FB rates created an arbitrage opportunity. These resellers began purchasing Centrex services at the volume-discounted rates and reselling them to small businesses (*i.e.*, those with less than 21 lines) that would not otherwise qualify for the volume discounts—but that also had little incentive to purchase a PBX switch. Pet. App. 5a-6a, 16a n.14. Such sales eroded Qwest's own sales of 1FB lines to these small business customers and, by keeping Qwest out of direct contact with these customers, further deprived Qwest of important opportunities to sell other services to them. *Id.* at 6a.

In 1991, Qwest first sought to limit the availability of the volume discount to the particular customers—those with more than 21 lines in a given location—for whom it was genuinely needed to compete against the PBX alternative. Pet. App. 5a. After a period of regulatory indecision, the WUTC deemed this change unlawful and abolished per location pricing. *Id.* at 6a. In April 1997, Qwest responded by reinstating per location pricing for just the features component of Centrex (*id.* at 7a), which, ten years before, the WUTC had deemed competitive and thus exempt from rate regulation. As both the Ninth Circuit and the district court found, "[t]his *later* imposition of per location pricing is the subject of the present suit." *Id.* (emphasis added); accord *id.* at 83a.

Despite this pricing change, MetroNet and other resellers continued to resell Centrex services successfully to small business customers without the features discount. Pet. App. 37a. In February 1998, however, Qwest complied with a new rate order of the WTUC by reducing the prices

of 1FB lines by 31 percent.[4] *Id.* at 44a-45a. Following this price cut, MetroNet began to lose customers, and its entire sales force resigned. *Id.* at 45a. Other resellers, however, continued successfully reselling Centrex services in competition with Qwest. *Id.* at 41a & n.14. As late as October 2000, resellers continued to sell more than 60,000 Centrex lines to small business customers; these sales constituted 31 percent of the total Centrex market. *Id.*

C. Procedural History

1. On January 10, 2000, MetroNet filed this lawsuit, alleging that Qwest's change in the pricing of Centrex violated section 2 of the Sherman Act. In a nutshell, MetroNet contended that Qwest had a monopoly over local telephone service for small businesses in the Seattle/Tacoma area and that Qwest, by raising the price it charged MetroNet for Centrex features, had denied MetroNet access to a "facility" essential to MetroNet's resale business.

The district court granted summary judgment to Qwest. Pet. App. 81a-97a. The court held that because the 1996 Act independently required Qwest during all relevant periods to provide pervasive access to its local exchange network, MetroNet could not show that Qwest was a monopolist in control of an essential facility or that it could have engaged in unlawful exclusionary conduct. *Id.* at 87a, 92a-93a. The court added that MetroNet could not show that Qwest's change in pricing policy had harmed *competition*—a prerequisite to a finding of exclusionary conduct—because it could not show harm to consumer welfare: "Qwest produced unrebutted evidence that the overall cost of Centrex to consumers dropped significantly when the local phone markets were opened up to competition under the Telecom Act. The fact that competition in the local business phone service

[4] In 1997, Qwest also introduced a new discount program, Centrex 21, that was targeted at small to medium business customers. This program offered discounts to small and medium businesses ordering three or more lines. Pet. App. 42a.

market can keep the price of Centrex overall below the pre-price-change level is sufficient to constitute no harm to consumer welfare." *Id.* at 94a.

The court of appeals initially reversed. Pet. App. 28a-80a. Although the court considered the matter "a close question" (*id.* at 32a), it held that MetroNet had presented triable issues of fact as to its antitrust claims. It concluded, among other things, that Qwest's actions in limiting the availability of its discounts to large business customers through the per location requirement could be found exclusionary—even though such price increases generally promote competition rather than stifle it. *See Berkey Photo, Inc.* v. *Eastman Kodak Co.*, 603 F.2d 263, 275 n.12 (2d Cir. 1979) ("high prices, far from damaging competition, invite new competitors into the monopolized market"). The court separately held that MetroNet could establish liability under the controversial "essential facilities" doctrine recognized in some lower courts (Pet. App. 69a-76a) simply by proving that it could not continue to earn a profit reselling Qwest Centrex services without those discounts, even though the 1996 Act separately gives rivals full access at regulated, pro-competitive rates to Qwest's facilities and services. *See* 47 U.S.C. §§ 251(c), 252(d).

In August 2003, Qwest sought this Court's review, but suggested that the Court hold the petition for certiorari pending its disposition of *Verizon* v. *Trinko*, *supra*, which raised similar questions about the relationship between telecommunications regulation and the antitrust laws.

2. In January 2004, this Court issued its decision in *Trinko*. 540 U.S. 398. Among other things, it held that (as Qwest has argued here) courts should very rarely impose antitrust remedies for a putative monopolist's refusal to deal with its rivals—both "because of the uncertain virtue of forced sharing and the difficulty of identifying and remedying anticompetitive conduct by a single firm," *id.* at 408, and because "[m]istaken inferences and the resulting false condemnations are especially costly" in that "they chill the very conduct the antitrust laws are designed to protect," *id.* at

414 (internal quotation marks and citation omitted). The Court further confirmed that such antitrust remedies are *particularly* disfavored where, as in this case, a pervasive scheme of federal or state regulation covers the same subject matter. *Id.* at 411.

In light of *Trinko*, this Court granted Qwest's petition for certiorari in this case, vacated the Ninth Circuit's decision, and remanded for further proceedings. Pet. App. 27a. On remand, the court of appeals concluded that *Trinko* required an affirmance of the original district court decision, which, as noted, had granted summary judgment to Qwest.

The court of appeals first observed that, in *Trinko*, this Court had held that "essential facility claims should ... be denied where a state or federal agency has effective power to compel sharing and to regulate its scope and terms." Pet. App. 8a (quoting *Trinko*, 540 U.S. at 411 (alteration in original; internal quotation marks omitted)). That fact, the court held, was fatal to MetroNet's essential facilities claim, since the WUTC had "the effective power to compel Qwest to share its local exchange network with competitors." *Id.* at 8a-9a.

The court of appeals then turned to MetroNet's related claim that Qwest had engaged in "exclusionary conduct" by refusing to deal with MetroNet. The court found that that this claim was likewise barred by *Trinko*, which reaffirmed "that as a general matter 'there is no duty to aid competitors.'" Pet. App. 12a (quoting *Trinko*, 540 U.S. at 411). The court specifically rejected MetroNet's claim, renewed in this petition, that this case falls within the ambit of *Aspen Skiing Co.* v. *Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985). It found that Qwest, unlike the defendant in Aspen Skiing, "was not forsaking short-term profits by switching from system pricing to per location pricing, but rather was attempting to increase its short-term profits," and that the switch thus "'sheds no light' upon whether Qwest was 'prompted not by competitive zeal but by anticompetitive malice.'" Pet. App. 15a (quoting *Trinko*, 540 U.S. at 409-10). Indeed, the court found, the per location policy enabled Qwest to engage

in a profit-maximizing "price discrimination structure" by precluding MetroNet from effectively extending Qwest's discounts not just to the larger customers that might otherwise have forgone Centrex altogether in favor of the PBX alternative, but to all customers that would otherwise continue paying non-discounted rates to Qwest. *Id.* at 16a-17a.

The court further found that, contrary to MetroNet's assumption, "[p]rohibiting a seller from eliminating arbitrage" can sometimes "*diminish* consumer welfare and allocative efficiency in the long run[.]" Pet. App. 22a-23a (emphasis added). That would be the case if, for example, the prohibition induces a seller to "choose not to offer a discounted price in the first place and instead charge a uniform price to all consumers." *Id.* at 23a. The court added that regulatory agencies such as the WUTC, not generalist antitrust courts, are better positioned to determine the precise economic circumstances in which preserving arbitrage opportunities might instead promote net allocative efficiency. *Id.* at 20a. In sum, the court concluded, "given the novel nature of MetroNet's claims, the regulatory structure that exists and the record of agency action in this case—and guided by [*Trinko*]—we decline to expand the scope of Section 2 liability to Qwest's attempts to eliminate arbitrage by MetroNet." *Id.* at 25a.

ARGUMENT

The decision below is correct and does not conflict with any decision of this Court or another court of appeals. The petition should be denied.

1. As an initial matter, the question presented in the petition, which the court of appeals aptly described as "novel" (Pet. App. 25a), has negligible recurring significance. Under the Telecommunications Act of 1996, a carefully calibrated regulatory regime comprehensively governs, among other things, the terms on which CLECs such as MetroNet may obtain wholesale discounts when purchasing an ILEC's

telecommunications services, such as Centrex and its features, for resale to end users. *See* pp. 2-3, *supra*.[5] This means, first, that "[t]he 1996 Act's extensive provision for access [to an ILEC's services] makes it unnecessary to impose a judicial doctrine of forced access" to those services on rates and terms different from those prescribed by the 1996 Act. *Trinko*, 540 U.S. at 411. Just as important for present purposes, it also means that resellers in MetroNet's position almost always resolve their disputes with ILECs in regulatory, not antitrust, settings. Tellingly, MetroNet cites no other post-1996 case—or any case—in which a court has discussed the question of a telecommunications carrier's *antitrust* liability for the wholesale prices it charges resellers.

MetroNet argues that the 1996 Act is somehow irrelevant to this case on the theory that "Qwest first began to change its Centrex Plus pricing policy from system to per location pricing in 1991," that "[t]his predates the 1996 Act by five years," and that "[t]he gravamen of MetroNet's complaint predates the 1996 Act[.]" Pet. 9. This argument is both wrong and beside the point. The WUTC ultimately invalidated the 1991 policy, and Qwest reinstated per location pricing (for features alone) in 1997. As the case comes to this Court, only "[t]his *later* imposition of per location pricing is the subject of the present suit." Pet. App. 7a (emphasis added); *accord id.* at 83a (district court finding).

MetroNet's temporal argument is irrelevant as well, for the WUTC exercised *state law* authority before 1996 to oversee issues relating to the relations between ILECs and CLECs.[6] MetroNet quarrels with the WUTC's 1987 state

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[5] In August 2000, Qwest and MetroNet entered into an interconnection agreement under the 1996 Act, and that agreement is enforceable by federal and state regulatory authorities.

[6] Indeed, in 1996 the FCC singled out the WUTC as one of the handful of state commissions that had developed a robust scheme of state regulation before 1996 to govern local telecommunications competition. *See* First Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499, 15817-19, ¶ 631 & n.1509 (1996).

law determination that switching features were sufficiently competitive that the government could best serve consumer welfare by declining to intervene in the terms on which they are sold to the public. Pet. 4; *see* Pet. App. 44a. Contrary to MetroNet's suggestion, however, the WUTC did not thereby create a jurisdictional lacuna in this area that could thereafter be filled (at least until 1996) through antitrust enforcement. Instead, the WUTC's 1987 determination signifies a deregulatory policy choice, grounded in its expert judgment about the state of competition in this market, that undermines MetroNet's assertion of a need for antitrust intervention. In all events, this case, with its complex overlay of federal and state regulation, would be a singularly inapt vehicle for resolving any legal question of general application.

2. Even apart from its inconsistency with the applicable regulatory schemes, MetroNet's antitrust claim is implausible. It is a fundamental tenet of antitrust law that, "[i]n the absence of any purpose to create or maintain a monopoly, the [Sherman Act] does not restrict the long recognized right of [a] trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal." *United States* v. *Colgate & Co.*, 250 U.S. 300, 307 (1919). *Trinko* reaffirms this principle. And it further confirms that *Aspen Skiing*—the case on which MetroNet primarily relies—"is at or near the outer boundary of § 2 liability" and that liability in *Aspen* turned on the defendant's telling "willingness to forsake short-term profits to achieve an anticompetitive end" by refusing to sell to its rival even at its full retail price. 540 U.S. 409.[7]

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[7] The defendant Skiing Co., which owned three of the four mountains in the Aspen area, "deterred [skiers] from skiing at Highlands," the competing ski facility, which owned the fourth mountain, by imposing additional costs on them if they did so. *Aspen Skiing*, 472 U.S. at 610. To accomplish this objective, the defendant not only discontinued a popular "All-Aspen," 4-mountain, 6-day ski pass it had previously offered jointly with Highlands, but also discontinued its own 3-area, 3-day pass and re-

That feature of *Aspen Skiing* is absent here, and it illustrates precisely why any finding of antitrust liability would be inappropriate on these facts. Qwest sold to MetroNet on exactly the same terms that it offered to its retail customers; like MetroNet, they too were subject to the per location pricing policy for Centrex features. And Qwest adopted that policy for all customers to *increase* its short term (and long term) profits—specifically, by confining its Centrex discounts to the large business customers that alone would otherwise take their business to independent PBX manufacturers. As the Ninth Circuit recognized, such differential pricing policies—and a seller's enforcement of such policies through the elimination of arbitrage—can enhance allocative efficiency and consumer welfare. Pet. App. 23a. Such policies must remain lawful if companies in Qwest's position are to retain proper incentives to adopt any welfare-maximizing discounts to begin with.[8] It is thus legally and economically

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fused to accept coupons issued by Highlands for ski tickets at the defendant's mountains even though Highlands was willing to pay the full retail price for those tickets. *Id.* at 593-94. The combined effect of these actions was to force skiers who wanted to ski Highlands either to forgo the convenience and cost savings of a discounted multi-mountain, multi-day pass or to pay to ski on Skiing Co.'s mountains even on days they skied at Highlands. This Court affirmed a jury verdict against the defendant because it found that "the evidence supports an inference that [the defendant] was not motivated by efficiency concerns and that it was willing to sacrifice short-run benefits and consumer goodwill in exchange for a perceived long-run impact on its smaller rival," thereby confirming that the sole purpose was to maintain its monopoly. *Id.* at 610-11. "*Aspen* . . . certainly does not hold that a monopolist must make its goods, services, or facilities available at a competitive rather than a monopolistic price." 3A Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law*, ¶ 772c, at 188 (2002); *see also Aspen Skiing*, 472 U.S. at 611 n.44.

[8] *See, e.g., In re Brand Name Prescription Drugs Antitrust Litigation*, 288 F.3d 1028, 1032 (7th Cir. 2002) ("Since price discrimination is not (in general) unlawful, neither are efforts to prevent arbitrage."); *see also* 8 Areeda & Hovenkamp, *Antitrust Law*, *supra* n.7, ¶ 1616f, at 226 (1989) ("[P]rohibition [of price discrimination] would worsen consumer welfare if—as I tend to believe—prohibiting the restraint would lead the manufacturer . . . to maintain the higher wholesale price while adopting more costly or less effective strategies for reaching low-price customers, or

unsound to insist, as MetroNet does, on a narrowly "cost-based justification" (Pet. 13) for limiting discounts to those customers that would otherwise take their business elsewhere. *See Brooke Group Ltd.* v. *Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 220 (1993) ("Congress did not intend to outlaw price differences that result from or further the forces of competition.").

Although MetroNet views the resulting price increase for some customers as evidence of anticompetitive effect, the *Trinko* decision confirms precisely the opposite. "The opportunity to charge monopoly prices—at least for a short period—is what attracts 'business acumen' in the first place; it induces risk taking that produces innovation and economic growth." *Trinko*, 540 U.S. 407. Indeed, penalizing such price increases with treble damages under the Sherman Act could well thwart "the underlying purpose of antitrust law, since it may lessen the incentive for the monopolist, the rival, or both to invest in . . . economically beneficial facilities." *Id.* at 407-08.

Finally, there is no basis for MetroNet's offhanded suggestion (Pet. 17) that the decision below somehow conflicts with *Covad Communications Co.* v. *Bell Atlantic Corp.*, 398 F.3d 666 (D.C. Cir. 2005). The refusal-to-deal claim in that case involved a decision by an ILEC *not to sell* a particular service to customers who had orders for that service pending with a CLEC. After the district court granted the ILEC's motion to dismiss that claim, the court of appeals reversed and remanded. It reasoned that the CLEC had effectively alleged in its complaint that the ILEC in fact "sacrifice[d] short-term profits in order to drive [the CLEC] out of the market," and that it remained "possible" that the ILEC would be shown, upon further factual development, to have sacrificed such profits. *Id.* at 676 (internal quotation marks and citation omitted). Here, in contrast, there is no

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even . . . to abandon his efforts to reach those customers altogether. I therefore regard price discrimination in aid of deep market penetration as a benefit.").

dispute that Qwest acted to maximize its short term (as well as long term) profits by adopting its per location pricing policy. For that reason among others, *Covad* does not remotely conflict with the decision below.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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